

.FO 1

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 515 of 1996

For Approval and Signature:

Hon'ble MR.JUSTICE M.S.PARIKH

=====

1. Whether Reporters of Local Papers may be allowed to see the judgements? Yes.

2. To be referred to the Reporter or not? No.

J

3. Whether Their Lordships wish to see the fair copy of the judgement? No.

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? No.

5. Whether it is to be circulated to the Civil Judge? No.

MUNIRKHAN @ MUNNO

ARJUMANKHAN PATHAN

Versus

STATE OF GUJARAT

Appearance:

MR PM THAKKAR, Sr. Advocate, for appellant.

MR SP DAVE, A.P.P. For Respondent.

CORAM : MR.JUSTICE M.S.PARIKH

Date of decision: 16/03/98

ORAL JUDGEMENT

This appeal has been directed against the judgment and order dated 14th May, 1996 rendered by the learned Additional Sessions Judge, City of Ahmedabad in Sessions Case No. 50 of 1995.

2. The appellant, herein described as the accused, has been convicted of the offences punishable u/s 376, 354, 451, 506(2) of the Indian Penal Code and has been sentenced to undergo rigorous imprisonment for seven years, one year, six months, and three months respectively and also to pay fine of Rs.3000/- i/d R.I. one year, Rs. 1000/- i/d R.I. for three months, Rs. 500/- i/d R.I. for one month, respectively.

3. It so happened that about 1-45 O'clock at mid night between 25th and 26th October, 1994 the accused who was armed with a knife committed trespass upon the hut occupied by one Salimaben. At that time, one Ibrahimhai Abdulkarim, Salimaben's brother aged about 72 years, was sleeping on the cot outside the hut and his daughter Aminaben was sleeping inside the hut. Said Aminaben, the prosecutrix, was accompanied with her father's sister Salimaben and Salimaben's daughter Faridaben inside the house. The accused threatened Ibrahimhai of life and entered in the hut. He also threatened the prosecutrix with knife in his hand and committed sexual assault on her. Salimaben having got up and having seen the accused committing sexual assault on Aminaben was compelled to go out of the hut. In this fashion the accused committed offence of rape with the prosecutrix Aminaben. He then proceeded to launch sexual assault on Faridaben. Police reached the scene of offence, it having been informed on telephone about the accused having been in process of committing serious offence of rape in the hut in question. After necessary investigation and submission of the charge sheet the case was committed to the Ahmedabad City Sessions Court. The accused having pleaded not guilty to the charge was tried. After his statement u/s 313 of the Code of Criminal Procedure was recorded and after arguments were heard the learned Additional City Sessions Judge rendered conviction and sentence, as aforesaid, against the accused. That is how the accused is before this Court in this appeal.

4. I have heard learned advocate for the appellant herein (accused) and learned A.P.P. for the respondent State of Gujarat. The submissions made on behalf of the accused revolve round appreciation of the evidence of the prosecutrix and lady doctor who examined both the prosecutrix and the accused. The said evidence has been read before this Court and therefore the same might be noted in brief.

5. The prosecutrix has been examined as P.W. 1 at exh. 8. She has deposed that she has been inhabitant of

village Devdatt of District and Taluka Sirohi in Rajasthan. She was aged 19 years at the time of her evidence recorded on 29th November, 1995 and was unmarried. According to her say, her father's sister Salimaben has been residing in a hut opposite to Hebatkhan's Mosque at Jamalpur in the city of Ahmedabad. As there was an occasion of "Shrimant" (connection with pregnancy) of Farida, Salimaben's daughter, she in the company of her father had been at Salimaben's hut in October, 1994. During that period, all the members of the family including Amina had been sleeping during the night time when the accused Munir arrived near the hut. When the father of the prosecutrix asked why he had been there, the accused had shown the knife and threatened her. He, then, committed trespass upon the hut. Prosecutrix, Salimaben and her daughter were sleeping. The accused assaulted the prosecutrix. He fell her on the ground. He cut of the string of the trouser (Payjama) which the prosecutrix had put on. He then committed sexual assault on the prosecutrix and had indulged in sexual intercourse with her. Salimaben tried to persuade the accused but he could not be persuaded. Salimaben thereafter went out to inform the police. The accused, in the process had hurt the prosecutrix on her lips. He had shown the knife to Faridaben also and told her to remove her clothes. In that way, Faridaben was also stripped off nearly naked by showing the knife and the jumper which she had put on was removed. By that time, the police reached the scene of offence. The accused had hidden himself behind the doors of the hut. The police apprehended him and snatched away from him the knife and he was taken to the concerned police station. She has deposed that after taking her complaint, her clothes were taken possession of under the panchanama and then she was sent for her examination. She identified the accused who was present in the Court. She also identified the muddamal article no. 1 being knife and the clothes which were attached for the purpose of examination. She pointed out the cut off string of the trouser which was one of the muddamal articles. In her cross-examination she has admitted that the accused threatened her father's sister Salimaben when the accused launched assault as aforesaid, and when Salimaben asked the accused why he had been there. She has also admitted that her father did not go inside the hut during the whole of the incident. She has also admitted that the accused took 10 to 15 minutes for committing the act of sexual intercourse with her and for launching sexual assault on to Faridaben. She has also admitted that she did not shout or scream for help nor did Salimaben and Faridaben. According to her, the Police reached the site

within about 10 to 15 minutes after the accused having committed sexual assault, as aforesaid. She received injury on account of the accused having indulged in biting some part of the face of the prosecutrix. She has further deposed that she had swelling. She has also admitted that even the accused had also been taken to the police station. She has also admitted that she might be aged 20 years at the time of her evidence. This is in short the evidence of the prosecutrix.

6. Next piece of evidence is one contained in oral testimony of is Dr. Rita Pravinkant Shah at exh. 11. She had occasion to examine the accused and the prosecutrix respectively at about 12-00 noon and at 11-00 a.m. on 26th October, 1994. That means that the medical examination of both the accused and the prosecutrix had taken place after about eight hours of the time of the incident. It is no doubt true that the medical witness has opined about complete intercourse with the prosecutrix having not taken place during last few hours and that the prosecutrix was used to sexual intercourse, it cannot be said that the evidence of this witness would run counter to the prosecution case as deposed to by the prosecutrix. Even before this medical witness the prosecutrix complained about she having been raped by the accused. Besides, it has been in the evidence that clothes of the accused and the prosecutrix were taken possession of for the purpose of the same being sent for their examination in the Forensic Science Laboratory (FSL for short). In the background of the aforesaid evidence, it has been submitted that the prosecution has failed to establish beyond reasonable doubt the offence of rape alleged to have been committed by the accused vis-a-vis prosecutrix and the offence of indecent assault vis-a-vis Farida inasmuch as the conduct of the witnesses at the time of incident and subsequent to the alleged incident would not sound natural. According to the submission of the learned advocate appearing for the appellant there is no resistance on the part of the prosecutrix or Faridaben against such assault launched by the accused. Even Salimaben after going out of the hut sat silent, sitting on the platform of the mosque and making no effort to seek assistance from the neighbour. Ibrahimbhai father of the prosecutrix also displayed similar unnatural conduct. This is despite the fact that there are about 50 to 60 huts in the adjoining area as submitted by the learned advocate appearing for the accused. Learned Additional City Sessions Judge while discussing the evidence adduced before him has appreciated the circumstances, one of which is that the accused was a head strong person of the locality and Salimaben knew him

as such. Besides, he was armed with the knife. Over and above these facts, he had approached the hut during the mid night and after having threatened Ibrahim the father of the prosecutrix committed trespass upon the hut and after having threatened the prosecutrix with knife he launched sexual assault on her. The prosecutrix has explained that the accused was quite strong built up man having with him the knife in question. The prosecutrix's father aged about 70 to 72 years was also under threat. Salimaben having gone out of the hut and finding that it was dark lonely night could not make her proceed beyond the platform of the mosque so as to lodge the complaint before the police. She was under fear of threat. All that happened with the poor hut dweller. It is a different matter that somebody did inform the police in the name of Municipal Corporator Mr. Devadiwala so that the police immediately reached the scene of offence. Learned Additional City Sessions Judge has discussed at length the telephonic information while treating it as F.I.R. at exh. 23. The evidence of the Investigating Officer as also the concerned police clearly indicates how the accused came to be apprehended from the hut itself. The report of the FSL with regard to clothes of the accused as well as the prosecutrix clearly lend support to the version of the prosecutrix. All the aforesaid circumstances and other pieces of the evidence as discussed by the learned Additional City Sessions Judge led him to accept the evidence of the prosecutrix as also the evidence of the other witnesses including Salimaben and Ibrahimhai. Having gone through the judgment of the learned Additional City Sessions Judge and the reasons recorded by him for convicting the accused herein I find that the submissions made by the learned advocate appearing for the appellant would clearly stand answered by the aforesaid circumstances as also by the pieces of the evidence which have been discussed by the learned Additional City Sessions Judge at length.

7. It has then been submitted on behalf of the accused that sexual intercourse which the accused had with the prosecutrix, was with her consent. According to the submissions made on behalf of the accused, the hymen of the prosecutrix was not intact and she was used to sexual intercourse. Secret part of the accused did not disclose any injury. There were no marks of injury on the body of the prosecutrix. All that would be suggestive of consent on the part of the prosecutrix in allowing the accused to have sexual intercourse with her. The learned Additional City Sessions Judge has given cogent reasons for not accepting the similar submissions

made before him. It is not in dispute that the accused happened to be a married person having wife and two minor children at the time when the incident occurred. It is also not in dispute that she had gone to the place of her father's sister's Salimaben on the occasion of Farida's "Shrimant". Accordingly, Farida was pregnant. Bearing in mind all these circumstances, it would hardly stand to reason that the prosecutrix and Faridaben would display either willingness or consent for allowing the accused to have sexual intercourse with them or either of them. It is true that Faridaben has not been examined by the prosecution. The prosecution has however assigned reason for the same. Explaining the medical evidence learned Additional City Sessions Judge has reproduced the relevant portion of the judgment of the Apex Court as appearing in para 8 thereof in the case of State of U.P. Vs. Babulnath, reported in (1994) 6 Supreme Court Cases 29. Paragraph so reproduced by the learned Additional City Sessions Judge would read as under :

"It may here be noticed that Section 375 of the IPC defines rape and the Explanation to Section 375 reads as follows:

"Explanation - Penetration is sufficient to constitute the sexual intercourse necessary to the offence of rape."

From the Explanation reproduced above it is distinctly clear that ingredients which are essential for proving a charge of rape are the accomplishment of the act with force and resistance. To constitute the offence of rape neither section 375 of IPC nor the Explanation attached thereto require that there should necessarily be complete penetration of the penis into the private part of the victim/prosecutrix. In other words, to constitute the offence of rape it is not at all necessary that there should be complete penetration of male organ with emission of semen and rupture of hymen. Even partial or slightest penetration of the male organ within the labia majora or the vulva or pudenda with or without any emission of semen or even an attempt at penetration into the private part of the victim would be quite enough for the purpose of Sections 375 and 376 of IPC. That being so it is quite possible to commit legally the offence of rape even without causing any injury to the genitals or leaving any seminal stains. But in the present case before us as noticed above there

is more than enough evidence positively showing that there was sexual activity on the victim and she was subjected to sexual assault without which she would not have sustained injuries of the nature found on her private part by the doctor who examined her."

8. Under the aforesaid circumstances, and for the reasons set out by the learned Additional City Sessions Judge it would clearly appear that the prosecution has established its case beyond reasonable doubt against the accused. Consequently, conviction which the accused has been facing deserves to be confirmed.

9. It has been submitted on behalf of the accused that some indulgence should be shown to the accused in the matter of sentence and he having undergone nearly five to six years of sentence including remissions he must now be released by reducing the sentence to one undergone. It has been submitted that the accused has the wife and two minor children. He has also aged parents. Besides, he has youngest child of six months of age. Having heard learned advocate for the appellant (accused) on the question of sentence, I am of the opinion that this is not a fit case for showing any indulgence in the matter of sentence. The fact that the accused happened to be a married person having two minor children at the time of the incident would run counter to any indulgence being shown in the matter of sentence. Learned Additional City Sessions Judge has recorded cogent reasons for imposing sentence, as aforesaid. Instead of directing the accused to undergo sentence of ten years or longer imprisonment he is directed to undergo sentence of seven years bearing in mind the circumstances of the case. I have no reason to interfere with such an order passed by the learned Additional City Sessions Judge.

10. In the result, this appeal is dismissed.